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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 892

IDA MAE PALMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the District of Columbia Court of Appeals (formerly the Municipal Court of Appeals) (Pet. App. A, pp. 19–23) is reported at 192 A. 2d 801. The *per curiam* order of the United States Court of Appeals for the District of Columbia Circuit denying, without opinion, a petition for allowance of an appeal from the judgment of the District of Columbia Court of Appeals (Pet. App. B, p. 24) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered

on December 11, 1963 (Pet. App. B, p. 24), and a petition for rehearing was denied on January 15, 1964 (Pet. App. C, p. 25). On February 15, 1964, pursuant to a motion filed February 14, the Chief Justice entered an order extending petitioner's time for filing a petition for a writ of certiorari to and including March 5, 1964, and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the officers had reasonable cause to believe that the person for whose arrest they had a warrant was in petitioner's house and that admittance had been refused them after their identity and purpose to execute the warrant had been made known, so as to justify their use of force to effect entry.

2. Whether the trial court properly declined to require the government to disclose the identity of a confidential informant who told the police that the person named in the arrest warrant was in petitioner's house.[1]

STATEMENT

On December 7, 1962, after a non-jury trial, petitioner was convicted in the Municipal Court for the District of Columbia (now the Court of General Sessions) of maintaining a common nuisance (defined as a place which is resorted to by narcotic drug addicts

[1] The second question stated was not raised on appeal. Petitioner asks the Court to consider it under the "plain error" principle.

for the purpose of using such drugs or in which such drugs are illegally kept or sold), in violation of Sections 33-416 and 33-423 of the District of Columbia Code (Tr. 1, 72, 79).[2] She was sentenced to 180 days' confinement (Tr. 75). The District of Columbia Court of Appeals affirmed the conviction (Tr. 95-96; Pet. App. A, pp. 19-23), and a petition for allowance of an appeal from the latter judgment was denied by the United States Court of Appeals for the District of Columbia Circuit (Pet. App. B, p. 24).

At the trial, 223 capsules of heroin, discovered in petitioner's home by officers of the Narcotics Squad of the Metropolitan Police Department, were received in evidence over petitioner's objection (Tr. 3-5, 45, 57). The principal errors claimed on appeal—and the only ones now urged—relate to the validity under the Fourth Amendment of the seizure of those narcotics. The evidence pertinent to this issue, as adduced at a hearing on a motion to suppress conducted during the course of the principal trial (Tr. 5-45, 81-83), may be summarized as follows:

Some time prior to 4:30 p.m. on August 8, 1962, officer David Paul of the Narcotics Squad received information from a confidential informant that one Joseph Vincent Jones, for whose arrest on a narcotics charge a warrant had been outstanding since about

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[2] "Tr." refers to the reporter's transcript of the trial proceedings, to which have been appended, consecutively paginated, the papers constituting the remainder of the trial record. It is on file with the Clerk of this Court.

July 30,[3] was at 1237 Half Street, S.W.—petitioner's residence (Tr. 6–9, 20, 21, 49, 58, 89–90). Paul had known the informant for several years and had on numerous prior occasions received information from him which had proved to be correct (Tr. 9). The officer had made two previous unsuccessful efforts to execute the arrest warrant—once at the address listed in the warrant as Jones' residence, where he was told Jones no longer lived, and again at the residence of his mother or mother-in-law, where he had sometimes stayed in the past (Tr. 9–12).

At approximately 8:50 a.m. on the following day, August 9, Paul and two fellow officers of the Narcotics Squad proceeded to the address on Half Street, where Paul knocked on the front door.[4] A male voice from

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[3] Jones was wanted in connection with an information, filed July 27, 1962, charging him with being a narcotic vagrant, in violation of Section 33–416a of the District of Columbia Code (Pet. App. A, p. 20, n. 2).

[4] It does not appear why Paul did not act on his information immediately upon its receipt, though the reason may possibly be inferred from the fact that he ordinarily went off duty at 4:30 p.m. (Tr. 6). (The information from the informant was apparently received late in the afternoon of the 8th, some time between 3 and 4 o'clock (see Tr. 6, 20, 45), though the precise time of its receipt was not definitely fixed.) Although defense counsel, in cross-examining Paul, queried the officer as to whether he thought it reasonable to suppose that Jones would be at the premises in question more than twelve hours after he was reported being there by the informant—a question disallowed by the court on the ground that it was for the court to decide whether the officer had acted reasonably and that counsel should simply "get the facts" (Tr. 20–21)—counsel never asked Paul to state why he did not act more promptly.

A possible explanation for Paul's apparent belief that Jones would still be at the Half Street premises on the 9th is to be

within asked who was there. Paul replied, "the police", and stated that he had a warrant for the arrest of Joseph Jones. The door had glass panels in it, covered by partially closed Venetian blinds. Through the lower part of the blinds Paul and one of the officers who had accompanied him could see a man standing just inside the door. There being no response from the person inside, Paul again knocked and again stated the purpose of his call. At this time the officers observed the man inside turn, run from the doorway, and disappear. The officers, believing that they had been refused admittance, forced the door and entered (Tr. 20–22, 54).

Paul immediately went to the second floor, where, through an open bedroom door, he saw petitioner standing with her back to an open closet, making a motion toward it with her right hand (Tr. 23–24). Entering the room, the officer explained to petitioner that he was looking for Joe Jones, and he inspected the closet to see if Jones was hiding there (Tr. 24–

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found in the officer's prior knowledge and experience concerning these premises. Paul testified (at the trial in chief) that several years prior to the incidents in issue he discovered a fugitive from justice hiding in this house—in petitioner's presence (Tr. 67–68). It is also to be noted that the charge on which Jones was wanted was for being a narcotic vagrant (defined in relevant part as a narcotic drug user who is found in a place where illicit narcotic drugs are kept, used, or dispensed (D.C. Code, § 33–416a(b)(1)(B))). The house on Half Street, it appeared at the trial, was in fact the residence of a narcotic drug addict, John Arthur Palmer, petitioner's husband, though the record does not show that Paul knew this. (Palmer was serving a sentence for a narcotics violation at Occoquan, Virginia, at the time of the discovery of the narcotics in issue (Tr. 61, 63).)

25, 27–28). There was no one in the closet, but the officer noticed on the closet floor, in plain sight, the capsules of heroin in issue, some lying loose and some in a bag (Tr. 25–26). Paul picked up the bag and capsules and, continuing his search for Jones, proceeded to the next room (another bedroom). There, hiding behind some furniture, he found a man whose attire marked him as the person whom the officers had seen earlier at the door (Tr. 26, 29, 33, 54). This individual turned out to be one William Harrison. His wife, Irene, and another person, Virginia Minor, were also found on the premises (Tr. 26, 48, 51, 59).[5] A search of the rest of the house for Jones proved unsuccessful (Tr. 26–27).

Paul, on cross-examination by petitioner's counsel, denied that his purpose in going to the premises was to use the arrest warrant as a pretext for searching petitioner's house; his only objective, he testified, was to effect the arrest of Jones (Tr. 29).

ARGUMENT

1. Petitioner contends that the officers' forced entry of her home was illegal because their information that Jones was in her house was "stale" (Pet. 13–14). Since the house was not Jones' residence, it is argued, the information that he was there on August 8 did not give reasonable cause to believe that he would still be there the next morning.

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[5] The Harrisons and Miss Minor were charged with being narcotic vagrants, in violation of D.C. Code, § 33–416a (see fn. 4, supra, pp. 4–5). They were tried together with petitioner and convicted but did not appeal (Pet. App. A, p. 20, n. 3).

The record does not explain why the officers failed to act on their information the day it was received (see fn. 4, pp. 4–5, *supra*). Though counsel for petitioner had ample opportunity to do so, he made no attempt to elicit from Paul his reasons for waiting until the following morning. There is no occasion, however, to speculate as to the cause of the delay, or to consider the reasonableness of the officers' belief that Jones would still be on the premises the morning of the 9th. For whether or not the officers had "probable cause" to believe Jones inside at the time they arrived at the house, the events which occurred immediately thereafter provided ample grounds for their subsequent forceable entry.

As we have shown (*supra*, pp. 4–5), after the officers knocked, a male voice from within inquired who was there. The officers, who could see the person inside through the partially closed Venetian blinds, identified themselves as policemen and stated that they had a warrant for the arrest of Joseph Jones. After a pause, during which the man inside neither responded nor opened the door, the officers again knocked and again stated their business, only to see the man turn, run, and vanish. At that point, the officers could reasonably conclude that Jones was in the house; that the man who had fled was probably Jones; and that in any case that person had refused them admittance after he had been clearly apprised of their identity and the purpose of their call. In these circumstances it was lawful for the officers to force the door and enter. *Miller* v. *United States*,

357 U.S. 301; *Gibson* v. *United States*, 149 F. 2d 381, 383, n. 5 (C.A.D.C.); certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U.S. 724; *Accarino* v. *United States*, 179 F. 2d 456, 465 (C.A.D.C.); *Gatewood* v. *United States*, 209 F. 2d 789 (C.A.D.C.). Cf. *Jones* v. *United States*, 262 F. 2d 234 (C.A.D.C.), reversed on other grounds, 362 U.S. 257; *Jones* v. *United States*, 304 F. 2d 381 (C.A.D.C.), certiorari denied, 371 U.S. 852 (same case on remand); 18 U.S.C. 3109.* Later, when officer Paul noticed narcotics lying on the floor of a closet in which he had reason to believe Jones was hiding, he was entirely justified in seizing the contraband. *Harris* v. *United States*, 331 U.S. 145, 154–155; *Love* v. *United States*, 170 F. 2d 32 (C.A. 4), certiorari denied, 336 U.S. 912; *United States* v. *Joines*, 258 F. 2d 471 (C.A. 3), certiorari denied, 358 U.S. 880.

Obviously, if the arrest warrant were used as a mere pretext for searching the house for narcotics, the entry and ensuing search could not be sustained. Here, however, Officer Paul explicitly disclaimed such a purpose (*supra*, p. 6), and there was absolutely no evidence to the contrary. The trial court reasonably found, therefore, as the court of appeals held (Pet. App. A, p. 22), that the officers acted with a bona fide intention to locate and arrest Jones in petitioner's house.

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* *Wong Sun* v. *United States*, 371 U.S. 471, 473–474, 479–484, relied on by petitioner (Pet. 15–17), is plainly distinguishable. In that case the arresting officer had no arrest warrant and initially misstated his identity and the purpose of his call. Here the officers had a warrant and employed no deceit.

2. The trial court sustained the government's objection, based on the informer privilege (see *Roviaro* v. *United States*, 353 U.S. 53, 59; *Rugendorf* v. *United States*, No. 223, this Term, decided March 30, 1964), to a request by petitioner's counsel that Officer Paul identify the confidential informant who told him that Jones was at the house on Half Street (Tr. 6–8; Pet. 7–8). While acknowledging that the point was not raised on appeal (Pet. 9, n. 1), petitioner now urges that this ruling was erroneous (Pet. 9–12), and asks the Court to take cognizance of it under the "plain error" principle (Rule 52(b), F. R. Crim. P.). We submit that the ruling was, in any event, correct.

This case does not involve the validity of a search warrant based in whole or in part on information from a confidential source (see *Rugendorf* v. *United States*, *supra*); or the legality of a search without a warrant, the alleged probable cause for which consists wholly or partially of such information;[1] or an arrest without warrant based on confidential information, followed by an incidental search of the person arrested (see *State* v. *Beck*, 175 Ohio St. 73, 191 N.E. 2d 825 (1963), certiorari granted February 17, 1964, No. 696, this Term (Pet. 11). Here the officers had an undeniably valid arrest warrant, the validity of which, so far as appears, in no way dependend on confidential informa-

[1] As noted in our brief in *Rugendorf*, the decisions are in conflict as to whether, where confidential information is the sole basis for such a search, or an indispensable element of that basis, disclosure of the identity of the informant is required (pp. 40–41, n. 17).

tion. The pertinent confidential information had to do solely with where the person named in the warrant, whom the officers had been unable to locate, could be found. The officers, acting on their informant's "tip" that the person whom they were looking for was at a specified address, went to that address and, when denied admittance after announcing their purpose, entered by force in order to effect the person's arrest. In effecting entry, however, the officers did not rely simply, or even in indispensable part, on their confidential information. Before entering, they obtained firsthand knowledge—the evidence of their own senses—sufficient to justify them in concluding, wholly apart from their confidential information, that the person they were looking for was indeed in the house. See *supra*, pp. 4–5, 7–8.

In these circumstances the well settled rule referred to at pp. 39–40 of our *Rugendorf* brief—that where officers, acting on confidential information, undertake an investigation of their own and thereby obtain sufficient firsthand intelligence to constitute probable cause for a search independently of the initiating information, disclosure of the informant's identity is not required (see *Scher* v. *United States*, 305 U.S. 251, 254, and the other decisions cited at p. 40, n. 16)—is applicable by analogy. In such a situation, since the confidential information is confirmed, or appears to the officers to be confirmed, by the evidence of the officers' own senses, no sound reason exists for departing from the general rule, grounded in considerations of fundamental public policy, permitting the government to preserve the secrecy of its confidential sources of information.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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